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The Illinois Public Employee Relations

REPORT

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Information Disclosure in Illinois Public Sector Labor Relations

by A. Lynn Himes and Sarah E. Joyce

INTRODUCTION

Public sector labor relations law in Illinois clearly recognizes a duty on behalf of public employers to disclose information to employees' exclusive representatives that is relevant and necessary to the performance of the representative's duties. The result of a public employer's failure to disclose requested information may be the issuance of an unfair labor practice charge for failure to bargain in good faith under Section 14(a)(5) of the Illinois Educational Labor Relations Act[1] or Section 10(a)(4) of the Illinois Public Labor Relations Act.[2]

The rationale behind the duty to disclose in labor relations is two fold. First, the exchange of relevant information is necessary for the collective bargaining process to function properly. Second, disclosure of information to the employees' exclusive representative is necessary for the representative to fulfill its duty of policing the administration of an existing contract. Thus, while the duty to disclose information initially arises during contract negotiations, it extends to labor-management relations throughout the term of the contract as well, and requires the disclosure of information related to the investigation and processing of grievances through arbitration.

Although the duty to disclose information is often phrased in terms of a shared duty on the part of both parties to the collective bargaining relationship, thereby imposing a duty on a union to provide information needed by an employer to fulfill its bargaining role, there are no cases in Illinois that specifically address a union's duty to furnish information to an employer.[3]

The genesis of the duty to disclose information in Illinois public sector labor relations has been National Labor Relations Board decisions and federal court case law interpreting the National Labor Relations Act.[4] In the 1950's, the issue of information disclosure in private sector labor relations was first brought to the attention of U.S. Supreme Court in *NLRB v. Truitt.*[5] In *Truitt*, the employer asserted an "inability to pay" argument at the bargaining table, but refused to disclose information about its finances to the employees' bargaining representative. The Supreme Court held that the NLRB had the right to consider the employer's failure to disclose financial information in determining whether the employer had failed to bargain in good faith.[6]

Shortly thereafter, in *NLRB v. Acme Industrial Co.*,[7] information disclosure was again brought to the attention of the U.S. Supreme Court. In that case, the Supreme Court expanded its holding in *Truitt*, and held that an employer has a "general obligation . . . to provide information that is needed by a bargaining representative for the performance of its duties," thereby extending the duty to disclose information to apply to labor-management relations during the term of a collective bargaining agreement.[8]

Again in the late 1970's, the U.S. Supreme Court looked at the issue of information disclosure in *Detroit Edison Co. v. NLRB.*[9] In that case, the Supreme Court held that an employer's duty to disclose information to its employees' exclusive representative is not absolute, and that relevant information need only be disclosed if the necessity to the representative outweighs the legitimate interests of the employer in controlling access to it.[10]

For the most part, public sector labor law in Illinois has followed federal private sector law in applying and interpreting the duty to disclose information.[11] What follows is a discussion of the current state of the law in Illinois related to information disclosure in public sector labor relations.

INSIDE

RELEVANT AND NECESSARY INFORMATION

The duty to bargain in good faith requires public employers to disclose relevant information that is needed by an exclusive bargaining representative for the performance of its duties.[12] The obligation of the employer to disclose relevant information, and a determination of whether the duty to bargain in good faith has been met, will be decided based upon the particular circumstances of each case presented.[13] Thus, an employer's refusal to disclose information is generally only evidence of bad faith, and not bad faith *per se*.[14]

The burden of proof initially falls on the union to demonstrate the relevance of the information requested.[15] Generally, a good faith showing of some relevance will afford the union disclosure of the information. The relevance of requested information is viewed from a liberal discovery-type standard and not a trial-type standard.[16] This liberal standard is intended to "facilitate the relationship between employer and collective bargaining agent, and encourage maximum disclosure in the interest of voluntary resolution of disputes."[17]

PRESUMPTIVELY RELEVANT INFORMATION

Some types of information have been held to be presumptively relevant to the collective bargaining relationship, and thus there is no need for a union to make a case by case showing of the relevance of such information.

The IELRB has held that if information concerns "wages [or] fringe benefits," it is presumptively relevant, and there is no need to make a case by case determination of relevance.[18] In *Cahokia Community School District 187*, the Educational Labor Relations Board found that because emergency leave constitutes a fringe benefit of employment, a union's request for information about employees' emergency leaves is presumed to be relevant to carrying out its duties as the exclusive representative for the employees.[19] The Educational Labor Relations Board has also determined that information concerning an employer's compliance with an arbitration award or information that is necessary to monitor an employer's compliance with a grievance settlement is relevant to a union's performance of its duties as an employee representative.[20]

The State and Local Boards have held that broad ranges of information are presumed to be relevant. The Local Labor Relations Board has held that information about "terms and conditions of employment" is presumptively relevant.[21] The State Board has held that information concerning "bargaining unit employees" is presumptively relevant.[22]

If an employer raises an "inability to pay" argument during collective bargaining, financial information is relevant.[23] This presumption has also been construed by the Educational Labor Relations Board to apply to information about an employer's claim that it cannot remain competitive with comparable employers.[24]

INFORMATION RELATED TO A POTENTIAL CONTRACT VIOLATION

It is clear that the duty to disclose information extends beyond contract negotiations and pending grievances, and applies to information that is relevant and necessary for an employee representative to investigate whether a term of a collective bargaining agreement has been violated.[25] However, when information requested does not relate to a pending grievance or other contractual dispute, unions subject to the Illinois Public Labor Relations Act may be required to provide a "reasonable basis" for the belief that a contract violation has occurred before the information will be required to be disclosed.

In *Water Pipe Extension Bureau of Engineering, Local 1092 v. City of Chicago*,[26] the Illinois Appellate Court upheld the Local Labor Relations Board's determination that, absent a pending grievance, the "mere suspicion" by a union that an employer may not be following proper procedures is not enough for a union to establish that requested information is relevant.[27] Instead, the Appellate Court and Local Labor Relations Board require unions to show that the requested information will aid in the investigation of contract viola-

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Ms. Sarah E. Joyce graduated from the University of Illinois at Champaign-Urbana in 1991 and received a Juris Doctor degree from DePaul University College of Law in 1994. Ms. Joyce has experience representing school district and municipal clients in the negotiation of collective bargaining agreements, arbitration of labor disputes, and litigation of employment discrimination matters. Her practice is concentrated in the areas of employment discrimination, civil rights, labor law, and general school and municipal law. Ms. Joyce often lectures on employment discrimination issues and labor arbitration.

tions and establish "a reasonable basis to suspect such violations have occurred."[28]

However, the Educational Labor Relations Board has not adopted this requirement. The IELRB has required the disclosure of information in several cases in which no grievance was pending, without any discussion of a standard like the "reasonable basis" standard affirmed by the Appellate Court in *Water Pipe Extension*.

In a case decided before *Water Pipe Extension*, the Educational Labor Relations Board affirmed, without comment, a hearing officer's decision that information regarding substitution assignments must be disclosed, although no grievance was pending.[29] The hearing officer stated that the information requested was relevant and necessary because it would enable the union "to discern whether a potential grievance existed."[30] While the facts of that case appear to establish that the union may have had a reasonable basis to believe a contract violation may have occurred, the hearing officer did not look to that evidence in determining whether the employer had a duty to disclose the information.

In a post-*Water Pipe Extension* case, the Educational Labor Relations Board affirmed, without comment, a hearing officer's decision that information regarding employee sick leave requests must be disclosed, although no grievance was pending. In that case, in response to an employer inquiry regarding the need for requested information, the union stated simply that it needed the information "to ascertain if there has been a violation of the collective bargaining agreement."[31] The employer did not request greater specificity. The Education Labor Relations Board held that the employer had a duty to disclose the information, again without looking at whether there was a reasonable basis to believe that a contract violation had occurred.

In another post-*Water Pipe Extension* case, the Educational Labor Relations Board stated that "an employer is not required to provide information unrelated to any pending grievance or contractual dispute, when the union offers no additional evidence of its need for the information."[32]

The most recent case decided on this issue, *Dupo Community Unit School District 196*,[33] sheds some light on what "additional evidence" may be required. In that case, the Educational Labor Relations Board determined that a union was entitled to information regarding the discipline of a teacher (*i.e.*, his removal from coaching and other extra-curricular duties and the issuance of a Notice to Remedy). The union stated that it needed the information to determine whether a violation of two specific contract provisions had occurred relating to the discipline of the teacher. The school district refused to disclose the information on the grounds that it related to a non-grievable action, the Notice to Remedy, and because there was no grievance pending. The Educational Labor Relations Board held that the school district had a duty to disclose the information. Thus, it appears that the "additional evidence" required by the Educational Labor Relations Board may consist simply of a statement by the union that the information is necessary to determine whether a specific action by the employer has violated a specific term of the parties' contract.

EMPLOYER DEFENSES TO DISCLOSURE

An employer may rebut a union's showing of relevance or raise competing legitimate interests in non-disclosure that will be balanced against the union's interests in disclosure. Even where information is relevant, a union is not entitled to requested information "where the employer has *bona fide* objections, such as reasonable good faith confidentiality concerns, or where there is an undue burden in compilation."[34] However, employer defenses to disclosure are to be narrowly construed.[35]

Arbitrability of a Pending Grievance

Where the underlying grievance is not substantively arbitrable under the parties' collective bargaining agreement, the information requested need not be disclosed.[36] However, where the underlying grievance may not be *procedurally* arbitrable, such as where the timeliness of the grievance is at issue, that is a matter for the arbitrator to resolve and the information requested must be disclosed.[37]

In *Lebanon Community Unit School District 9*,[38] the Educational Labor Relations Board held that where the subject of a grievance was not arbitrable, and the union offered no additional evidence of a need for the information requested, the employer was not required to disclose the requested information. In *Lebanon*, a grievance was filed alleging that the school district had discriminated against an employee based on race. The school board's policies prohibited discrimination based on race, but those policies were not a part of the parties' collective bargaining agreement, and the collective bargaining agreement did not address race discrimination. The Educational Labor Relations Board found that the underlying grievance was not substantively arbitrable, and therefore disclosure of the requested information was not required.

On the other hand, in *Thornton Community College*,[39] the employer argued that the grievance underlying the information request was untimely filed, and thus there was no duty to disclose the information. The union argued that the information was necessary to its defense of the procedural arbitrability of the grievance at arbitration. The Educational Labor Relations Board held that because it was the arbitrator's duty to determine the procedural arbitrability of the grievance, the employer was required to disclose the requested information.

Union Has No Intent of Grieving Employer Action

Where the Union does not intend to grieve an employee's discipline, information regarding that discipline need not be disclosed. In *City of Rockford*, two employees were suspended for differing lengths of time for different reasons. Both of the employees informed the union that they did not want to grieve their suspensions and refused to divulge specific information to the union regarding their suspensions. Thereafter, the union requested information regarding both employees' suspensions from the employer to "determine if the collective bargaining agreement was being violated."[40] The State Labor Relations Board General Counsel dismissed one of the unfair labor practice charges as untimely, and determined that there was no duty to disclose information related to the other employee's suspension, because the union had determined not to grieve that suspension when it learned that the employee at issue did not want it to pursue a grievance on his behalf.

Information Related to a Non-mandatory Subject of Bargaining

If information requested in conjunction with contract negotiations is related to a non-mandatory subject of bargaining, there is no duty to disclose it. In *Village of Franklin Park v. ISLRB*,[41] the union requested information related to scoring on the merit and efficiency portions of the fire fighters examination for promotion to lieutenant, which is a non-mandatory subject of bargaining. The Appellate Court affirmed the State Labor Relations Board's holding that information related to non-mandatory subjects of bargaining does not have to be disclosed.

Union Waiver of the Right to Information

Union waivers, such as through a binding zipper clause, may provide a defense to a request for information as well.[42] However, a union's waiver of the right to information must be clear, express, and unmistakable, indicating a conscious relinquishment of that right.[43]

In *Water Pipe Extension*, the parties' collective bargaining agreement provided for specific procedures to be followed relative to the filling of vacancies. Those procedures did not require the employer to disclose information to the union throughout the vacancy filling process. The collective bargaining agreement also contained a zipper clause, whereby the union and employer agreed that the "[a]greement constitutes the entire contract between the [parties] . . . ."[44] The union requested the continual disclosure of all documents related to the filling of vacancies in order to ensure that the vacancy filling procedures were being followed. The Illinois Appellate Court upheld the decision of the Local Labor Relations Board that the zipper clause, when read in conjunction with the contract's vacancy filling procedures, "constituted a waiver by the unions of a right of routine access to . . . information" regarding the filling of vacancies.[45]

However, in *City of Rockford*, the language of the zipper clause was found to be too broad to constitute a waiver of the right to disclosure of information. In that case, the clause stated "[t]his Agreement constitutes the entire Agreement between the parties and no verbal statement shall supersede or modify any of its provisions . . . ."[46] In holding that the union had not waived its right to the disclosure of information, the State Labor Relations Board General Counsel noted that the parties had not discussed the employer's duty to provide the union with information or the union's waiver of that right during collective bargaining.

The holdings in *Water Pipe Extension* and *City of Rockford* may be applied to cases where the parties' collective bargaining agreement contains a provision requiring the employer to disclose specific information to the union and a binding zipper clause. In such cases, an argument may be made that the union has waived its right to information that is not specifically included in the information disclosure provision of the parties' collective bargaining agreement.

Confidentiality and Privacy Concerns

Even where information is relevant, disclosure may not be required where an employer has a good faith confidentiality concern.[47] However, the burden of proving the confidential nature of the information rests on the employer.[48]

The origin of confidentiality as a defense to disclosure is found in the U.S. Supreme Court's decision in *Detroit Edison Co. v. NLRB*.[49] In *Detroit Edison Co.*, the U.S. Supreme Court held that an employer did not commit an unfair labor practice when it refused to disclose individual employees' test scores without first obtaining consent from the employees at issue. The Supreme Court took judicial notice of the "sensitivity of human beings" related to information that pertains to basic competence, and cited numerous federal and state laws protecting the confidentiality of employee personnel files and other records, including the *Family Educational Rights and Privacy Act of 1974*. Furthermore, the Court noted that there was evidence that past disclosure of such information had resulted in harassment of lower scoring employees, who had, as a result, left the company. Ultimately, the Supreme Court held that the company's interests in protecting employee confidence outweighed the burden on the union, and that the company's refusal to disclose the information did not violate its duty to bargain in good faith.

The public sector labor relations boards in Illinois have acknowledged that, in limited situations, the confidentiality interests of the employer or

other employees may outweigh the union's interests in the disclosure of information. In *Cahokia Unit School District 18*, the Educational Labor Relations Board affirmed a hearing officer's decision that a union did not have the right to the names of employees who had been disciplined for DUI-related offenses, absent consent of those employees or a subpoena. Information regarding employees who had been disciplined for DUI-related offenses was disclosed to the union without employee names. The Educational Labor Relations Board agreed with the hearing officer that the information was of such a sensitive nature that the employer's interest in protecting the confidentiality of the information, and individual employees' interests against disclosure, outweighed the union's interest in receiving the information unconditionally.[50] However, in the same case the Educational Labor Relations Board held that the employer was obligated to disclose employee emergency leave request forms because it did not offer any explanation why those forms were confidential.[51]

Further, employee sick leave requests that do not state the nature of the employee's illness, were held not to be of such a confidential nature as to preclude full disclosure of them, including employee names. In holding that the sick leave requests were not confidential, the Educational Labor Relations Board noted that the employer routinely placed the forms in open mail boxes, precluding employees from having any expectation of privacy.[52]

In *County of Cook*, the Illinois Appellate Court upheld the Local Labor Relations Board's decision that an employer has a duty to an employee representative to disclose investigative reports related to employee misconduct that contain summaries of employee statements, absent a particularized showing of an overriding need for confidentiality.[53] Further, although federal law recognizes the confidentiality of the verbatim statements of employees obtained during the course of an employer's investigation of employee misconduct, and thus does not require their disclosure, the Local Labor Relations Board in *County of Cook* expressed its preference that this exemption to disclosure not be adopted in Illinois. In reviewing the Local Board's decision, the Illinois Appellate Court agreed that the applicable National Labor Relations Board case, *Anheuser Busch Inc.*,[54] was distinguishable from a situation in which summaries of employee statements are contained in an investigative report.

The Appellate Court also expressly declined to hold that the ruling in *Anheuser Busch* must be adopted by the labor relations boards in Illinois. Instead the Court held that the question of the adoption of federal law by Illinois labor relations boards "is a question of policy, uniquely within the expertise of the Board."[55] Thus, it is likely that the State and Local Labor Relations Boards will require the disclosure of the statements of witnesses obtained in conjunction with an investigation of employee misconduct, absent a particularized showing of a need for confidentiality. One such reason for non-disclosure, alluded to by the Appellate Court in this case, may be a legitimate and substantiated risk of harm or harassment to employees whose statements are disclosed.

Disclosure Is Unduly Burdensome on the Employer

An employer may claim, at the time a request for information is made, that compiling the requested information is unduly burdensome.[56] Where disclosure of the information is especially burdensome on the employer and the information is available elsewhere, a refusal to disclose the information may not be a violation of the duty to bargain in good faith.[57] However, the availability of the requested information elsewhere will not generally vitiate the union's right to disclosure from the employer.[58]

In *Water Pipe Extension*, the union requested continual disclosure of all documents generated in the filling of vacancies, in order to police the parties' contract. The employer objected that this request was overly burdensome, and noted that some of the information requested was available through other sources, including the employees themselves. The Appellate Court affirmed the Local Labor Relations Board's decision, holding that the compilation and continuous disclosure of the information by the employer would be extremely burdensome, and that similar information available from other sources was sufficient to enable the union to determine whether a grievance should be filed.[59] Thus, the employer was not required to disclose the information requested.

DEFERRAL TO ARBITRATION

In some cases, a provision or provisions of the parties' collective bargaining agreement will require the employer to provide the union with information. In such cases, a failure to provide such information to the union may result in an unfair labor practice charge and/or a grievance. In two such cases, the Educational Labor Relations Board's Executive Director approved the deferral of the unfair labor practice charge proceedings to the grievance/arbitration procedure of the contract when the parties agreed to do so.[60] However, in *Danville Community Unit School District 118*, the Educational Labor Relations Board refused to order deferral to the parties' grievance/arbitration procedure over the union's objection.[61]

OTHER CONSIDERATIONS REGARDING THE DISCLOSURE OF INFORMATION: INFORMATION PROTECTED BY OTHER LAWS

Freedom of Information Act

An argument may be made that information is exempt from disclosure if it

is protected by an exemption under the *Freedom of Information Act*.[62] In *Local 1274, Illinois Federation of Teachers v. Niles Township High School District 219*,[63] the names and addresses of parents and students were requested by the union pursuant to a *FOIA* request. The Appellate Court held this information to be *per se* excluded from disclosure under FOIA, as personal information maintained with respect to students receiving educational services from public bodies. In addition, the court noted that the union had daily contact with parents, and that the purpose of the disclosure (a mailing regarding collective bargaining proposals) would contravene public policy.

Illinois School Student Records Act/Family Education and Privacy Rights Act

The Illinois School Student Records Act (ISSRA)[64] and the Family Educational Rights and Privacy Act (FERPA)[65] prohibit the release of student records or educational records without parental consent or a court order. The ISSRA defines school student records as any writing or other recorded information concerning a student and by which a student may be individually identified, maintained by a school or at its direction or by an employee of a school, regardless of how or where it is stored. FERPA defines education records as records that are "[d]irectly related to a student; and [are] maintained by an educational agency or institution or by a party acting for the agency or institution." Thus, information requested that falls within the ISSRA's or FERPA's definition of student records or educational records may be protected from disclosure.

It should be noted that in *Dupo Community Unit School District 196*,[66] the information required to be disclosed by the Educational Labor Relations Board included student statements regarding the disciplined teacher's conduct. While this information may have been protected by the ISSRA, that issue was not raised by the school district in that case.

Title IX of the Education Amendments of 1972, Office for Civil Rights Guidance Regarding Sexual Harassment of Students in Schools

The Department of Education Office for Civil Rights ("OCR") has advised school districts to honor requests for confidentiality made by students who complain of sexual harassment.[67] OCR's Guidance states that "an individual can be put on notice of allegations of harassing behavior and counseled appropriately without revealing, even directly, the identity of the student who notified the school."[68] Thus, the identity of a student-accuser in a matter involving student complaints of harassment may be exempt from disclosure pursuant to OCR's Guidance. However, if an employee is disciplined as a result of student complaints of sexual harassment and that discipline goes to arbitration, an arbitrator may determine that the employee's due process rights have been violated if he is not told the identity of his accusers.[69]

Privilege

Various privileges may apply to prevent disclosure of information, such as the attorney-client privilege or attorney work product privilege.[70] For example, if an attorney conducts an investigation of charges brought against a teacher and prepares a report based upon his or her findings for the Board of Education, that report may be protected from disclosure by the attorney-client privilege or attorney work product privilege. Therefore, if the teacher is disciplined as a result of the charges of sexual harassment, the report may be protected from disclosure by virtue of being privileged. However, if an attorney is hired to conduct an investigation of complaints of sexual harassment, and later the reasonableness of that investigation is made an issue in a court case or at an arbitration hearing, the attorney-client privilege or work product privilege may be viewed as waived.[71]

Additionally, the Illinois Supreme Court has held that a qualified privilege attaches to the closed session deliberations of a school board during bargaining strategy meetings. That privilege will likely prevent communications from such meetings from being disclosed as well.[72]

TIME AND FORM OF DISCLOSURE

The duty to disclose information arises when a union makes a good faith request or demand for relevant and necessary information.[73] Once the union has made a good faith demand for relevant and necessary information, the employer must make a diligent effor to provide the information in a reasonably prompt manner and useful form.[74] Although short delays in providing the information may be justified, excessive delays in furnishing information may support an unfair labor practice charge for failure to bargain in good faith.[75] However, the information requested does not have to be disclosed in an amount of time dictated by the union.[76]

In *University of Illinois at Chicago*,[77] approximately one month was found to be a reasonable amount of time for an employer to disclose extensive information regarding potential lay offs to a union, even though the information was disclosed one business day after the time set forth in the union's request. The IELRB Executive Director noted that there was no legal precedent that requires an employer to provide an almost instantaneous response to a union's information request, and that the information provided by the University was extensive and complete.

However, in *Cairo Unit School District 1*, disclosure of requested information nine months after the request was made, at the hearing on the unfair labor practice charge, was not sufficient.[78]

Further, information does not have to be furnished in the specific form

requested by a union.[79] An employer fulfills its obligation to bargain in good faith by making a reasonable effort to provide the requested information in a manner that is not so burdensome as to impede the bargaining process.[80]

Notably, in *Chicago Transit Authority*,[81] the Local Labor Relations Board held that an employer's conduct in providing incomplete and late disclosure of requested information was the result of carelessness, not bad faith, and thus did not violate the employer's duty to bargain in good faith. In that case, the employer's representative failed to disclose two requested documents to the union until the day of the grievance hearing, because he "did not know . . . about the two documents." He also failed to provide the Union with other requested documents, the existence of which he also alleged he was not aware. The Local Labor Relations Board noted that the grievance "was not very high on [the employer representative's] list of priorities," and stated that his conduct "bespeaks a certain lack of preparation."[82] However, because his conduct did not rise to the level of bad faith, a violation of the duty to bargain in good faith was not proven.

CONCLUSION

In conclusion, public employers have a statutory duty to provide employee representatives with relevant information needed by the representative to perform its duties in contract negotiations and in the investigation and processing of grievances. However, employer defenses to the duty to disclose exist, and an employer's interests will be taken into account in determining whether the duty to disclose information arises in each particular case. There are various defenses to the duty to disclose, but it is clear from case law reviewed to date that defenses to disclosure will be interpreted narrowly, and that an employer's countervailing interests must be particular, compelling, and substantiated by evidence in order to outweigh the union's right to disclosure. ◆

Notes

1. 115 ILCS 5/14 (a)(5) (1998); *see Thornton Community College*, 5 PERI ¶ 1003 (IELRB 1998).

2. 5 ILCS 315/10 (a)(4) (1998); *see Water Pipe Extension Bureau of Eng'g, Laborers Local 1092 v. City of Chicago*, 195 Ill. App. 3d 40, 441 N.E.2d 1324 (1st Dist. 1990).

3. *See County of Cook v. ILLRB*, 266 Ill. App. 3d 53, 639 N.E.2d 187 (1st Dist. 1994)("There is a general duty on both sides of a labor dispute to provide and share relevant information with each other in order for the parties to perform their respective bargaining roles.").

4. 29 U.S.C. §§ 151-169.

5. 351 U.S. 149 (1956).

6. *Id.* at 152.

7. 385 U.S. 432 (1967).

8. *Id.* at 435-36.

9. 440 U.S. 301, 318 (1979).

10. *Id.*

11. *But see County of Cook*, 266 Ill. App. 3d 53, 639 N.E.2d 187.

12. *Water Pipe Extension*, 195 Ill. 3d 50, 551 N.E.2d 1324; *Thornton Community College*, 5 PERI ¶ 1003.

13. *County of Cook*, 266 Ill. App. 3d 52, 639 N.E.2d 187; *Hardin County Community Unit Sch. Dist. No. 1*, 7 PERI ¶ 1038 at IX-150-51 (IELRB 1991), *quoting Racine Education Association v. Racine Unified Sch. Dist.*, Dec. No 23094-A, at 7-8 (W.E.R.C. 1986).

14. *Chicago Transit Auth.*, 4 PERI ¶ 3013 (ILLRB 1988).

15. *Hardin County Community Unit Sch. Dist. No. 1*, 7 PERI ¶ 1038 at IX-150- 51.

16. *Id.*; *Chicago Transit Auth.*, 4 PERI ¶ 3013 at XI-99.

17. *Hardin Community Sch. Dist. No. 1*, 7 PERI ¶ 1038 at IX-151, *citing Thornton Community College*, 5 PERI ¶ 1003 at IX-15.

18. *Cahokia Community Unit Sch. Dist. 187*, 8 PERI ¶ 1026 (IELRB H.O. 1992), *aff'd*, 8 PERI ¶ 1058 at IX-246 (IELRB 1992), *citing Hardin Community Unit Sch. Dist. No. 1*, 7 PERI ¶ 1038 at IX-151.

19. 8 PERI ¶ 1058 at IX-246.

20. *Cairo Unit Sch. Dist. No. 1*, 14 PERI ¶ 1019 (IELRB ALJ 1997), *citing Cahokia Community Unit Sch. Dist. No. 187*, 8 PERI ¶ 1026; *West Harvey- Dixmoor Public Sch. Dist. No. 147*, 6 PERI ¶ 1129 (IELRB 1990).

21. *Chicago Transit Auth.*, 4 PERI ¶ 3013 at XI-99 (citations omitted).

22. *City of Rockford*, 8 PERI ¶ 2014 (ISLRB 1992).

23. *University of Illinois*, 4 PERI ¶ 1062 at IX 219-20.(IELRB H.O. 1988); *citing Truitt.*

24. *University of Illinois*, 4 PERI ¶ 1062 at IX 219-20.

25. *Danville Community Consolidated Sch. Dist. 118*, 4 PERI ¶ 1105 (IELRB H.O. 1988), *aff'd*, 5 PERI ¶ 1032 (IELRB 1989).

26. 195 Ill. App. 3d 50, 551 N.E.2d 1324 (1st Dist. 1998).

27. *Id.* at 61, 551 N.E.2d at 1329-30.

28. *Id.*; *see also City of Rockford*, 8 PERI ¶ 2014 at X-81 (a union's "bare assertion that it needs certain information . . . is not enough to place an employer under an obligation to comply with its request.").

29. *Danville Community Consol. Sch. Dist. 118*, 5 PERI ¶ 1032 (IELRB 1989).

30. 4 PERI ¶ 1105 at IX-438.

31. *Hardin Community Unit Sch. Dist. No. 1*, 7 PERI ¶ 1038 at IX-151.

32. *Lebanon Community Unit Sch. Dist. No. 9*, 11 PERI ¶ 1032 at IX-132 (IELRB March 30, 1995) (*citing Tyson Foods Inc.*, 311 NLRB 552 (1993)).

33. 13 PERI ¶ 1044 (IELRB 1997).

34. *Hardin County Community Sch. Dist. No. 1*, 7 PERI ¶ 1038 at IX-151, *citing Racine Education Assoc. v. Racine Unified Sch. Dist.*, Dec. No. 23094-A (W.E.R.C. 1986)).

35. *Chicago Transit Auth.*, 4 PERI ¶ 3013 at XI-99.

36. *Lebanon Community Unit Sch. Dist. 9*, 11 PERI ¶ 1032 at IX-132.

37. *Thornton Community College*, 5 PERI ¶ 1003.

38. 11 PERI ¶ 1032 (IELRB 1995).

39. 5 PERI ¶ 1001 (IELRB 1988).

40. 8 PERI ¶ 2014 at X-81.

41. 265 Ill. App. 3d 997, 638 N.E.2d 1144 (1st Dist.), *review denied*, 157 Ill. 2d 498, 642 N.E.2d 1277 (1994).

42. *Water Pipe Extension*, 195 Ill. App. 3d 50 at 63-65, 551 N.E.2d at 1331- 32.

43. *City of Rockford*, 8 PERI ¶ 2014 at X-82.

44. 195 Ill. App. 3d at 64, 551 N.E.2d at 1331.

45. *Id.* at 65, 551 N.E.2d at 1332.

46. *City of Rockford*, 8 PERI ¶ 2014 (ISLRB 1992).

47. *Cahokia Community Unit Sch. Dist. 187*, 8 PERI ¶ 1026 at IX-112, *citing Hardin Community Unit Sch. Dist. No. 1*, 7 PERI ¶ 1038 (IELRB 1991).

48. *See Hardin Community Unit Sch. Dist. No. 1*, 7 PERI ¶ 1038 at IX-151.

49. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

50. *Cahokia Community Unit Sch. Dist. 18*, 8 PERI ¶ 1026 (IELRB 1992).

51. *Id.*

52. *Hardin Community Unit Sch. Dist. No. 1*, 7 PERI ¶ 1038 at IX-151.

53. 266 Ill. App. 3d 52 at 59-60, 639 N.E.2d at 192-93.

54. 237 N.L.R.B. 982 (1978).

55. 266 Ill. App. 3d at 59-60, 639 N.E.2d at 192-93, quoting, *Board of Trustees of Community College Dist. No. 502 v. IELRB*, 241 Ill. App. 3d 914, 917 (1993).

56. *Hardin Community Unit Sch. Dist. No. 1*, 7 PERI ¶ 1038 at IX-151.

57. *Water Pipe Extension*, 195 Ill. App. 3d at 61, 551 N.E.2d at 1329.

58. *Bloomingdale Sch. Dist.*, 4 PERI ¶ 1079 (IELRB Exec. Dir. 1988); *Ill. State Bd. of Educ.*, 4 PERI ¶ 1139 (IELRB Exec. Dir. 1988).

59. *Danville Community Unit Sch. Dist. 118*, 5 PERI ¶ 1032 (IELRB 1989), *citing Kildeer Community Sch. Dist. No. 96*, 2 PERI ¶ 1057 (IELRB 1986) (holding that deferral to arbitration of disputes involving statutory as well as contractual rights is not appropriate). *Accord, Local 1274, Ill. Fed'n of Teachers v. Niles Township Sch. Dist. 219*, 276 Ill. App. 3d 714, 659 N.E.2d 18 (1st Dist. 1995)(holding that there is no requirement that the union exhaust its administrative remedies under a collective bargaining agreement prior to filing a Freedom of Information Act request for information).

60. *Id.*; *DUPO Community Unit Sch. Dist. 196*, 13 PERI ¶ 1044 at IX-157.

61. *Water Pipe Extension*, 195 Ill. App. 3d at 62, 551 N.E.2d at 1330.

62. 5 ILCS 140/1 *et. seq.*

63. 287 Ill. App. 3d 187, 678 N.E.2d 9 (4th Dist. 1997).

64. 105 ILCS 10/1 *et seq. See also*, Section 10/5(f)(2) ("Nothing contained in this Act shall be construed to impair or limit the confidentiality of . . . information which is communicated by a student or parent in confidence to school personnel.").

65. 20 U.S.C. 1232g, *et seq.*

66. 13 PERI ¶ 1044 (IELRB 1997).

67. *Sexual Harassment Guidance: Harassment of Students by Sch. Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12043 (March 13, 1997).

68. *Id.*

69. *See Renton Sch. Dist.* and *Services Employees Int'l Union Local 6*, 102 Lab. Arb. (BNA) 854 (1994) (Wilkinson, Arb.)(School district's failure to identify the grievant's accusers prior to an arbitration hearing violated his due process rights, wherein the arbitrator questioned the district's concerns about retaliation, pointing out that the grievant had been suspended and thus was not present in the work place.).

70. Ill. S. Ct. Rule 201(b)(2).

71. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 422 (7th Cir. 1989); *Pray v. New York City Ballet Co.*, 73 Fair Emp. Prac. Cas. (BNA) 1714 (S.D.N.Y. 1997); *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084 (D.N.J. 1996); *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal. App. 4th 110, 128 (2d Dist. 1997); *Payton v. New Jersey TurnPike Authority*, 148 N.J. 524 (1997).

72. *IELRB v. Homer Community Consol. Sch. Dist. No. 208*, 132 Ill.2d 29, 39- 40, 547 F.2d 182-87 (1989).

73. *Cahokia*, 8 PERI ¶ 1026; *Chicago Transit Auth.*, 4 PERI ¶ 3013.

74. *Id.*, (citations omitted); *County of Cook*, 266 Ill. App. 3d at 61, 639 N.E.2d at 193 ("The information requested must be made available in a useful format.").

75. *University of Illinois at Chicago*, 13 PERI ¶ 1038, (IELRB Exec. Dir. 1997); *Chicago Transit Auth.*, 4 PERI ¶ 3013.

76. *University of Illinois at Chicago*, 13 PERI ¶ 1038.

77. 13 PERI ¶ 1038 (IELRB Exec. Dir. 1997).

78. 14 PERI ¶ 1019 (IELRB ALJ 1997).

79. *Id.*

80. *Hardin Community Unit Sch. Dist. No. 1*, 7 PERI ¶ 1038, at IX-151; *Chicago Transit Auth.*, 4 PERI ¶ 3013 at XI-99; *County of Cook*, 266 Ill. App. 3d at 61, 639 N.E.2d at 167.

81. 4 PERI ¶ 3013 (IELRB 1988).

82. *Id.* at XI-100.

RECENT DEVELOPMENTS

by the Student Editorial Board

Recent Developments is a regular feature of *The Illinois Public Employee Relations Report.* It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the two collective bargaining statutes and the First Amendment.

IELRA Developments

Deferral to Arbitration

In *General Service Employees Union, Local 73, SEIU and Board of Trustees of the University of Illinois*, No. 97-CA-0034-C (IELRB 1998), the IELRB held that referral to arbitration in cases alleging an independent violation of Section 14(a)(1) of the IELRA is inappropriate. Section 14(a)(1) prohibits educational employers from "interfering, restraining or coercing employees in the exercise of the rights guaranteed under the Act."

On July 1, 1996, several employees working in the University hospital's nutritional services department as food service workers, food service laborers, and nutritional assistants wore stickers on their uniforms protesting changes in work shifts that had become effective on that date. The stickers, which were provided by the Union, read "'Massive Shift Change' with a diagonal line through the words, followed by 'We Demand Respect' and 'SEIU Local 73.'" A University supervisor ordered the employees to remove the stickers because they were not part of the employees' uniforms.

The Union filed an unfair labor practice charge against the University

in December 1996 alleging that the University violated Section 14(a)(1) of the IELRA by ordering the employees to remove the stickers. During the hearing, the Union argued that other bargaining unit members had worn non-University approved items on their uniforms (political buttons, corsages) in the presence of supervisory personnel, during working hours, and had never been ordered to remove them. The University, on the other hand, presented evidence of the hospital dress code which prohibits, among other items, the wearing of any sticker not authorized by the University. In addition, the parties' collective bargaining agreement included a provision on uniform requirements in which employees were to wear uniforms and other apparel "whenever the employer so requires and in the manner it prescribes."

The ALJ, relying on National Labor Relations Board precedent, determined that the charge should be referred to arbitration since it alleged both statutory and contractual violations. The Board reversed the ALJ's decision. The Board was guided by the legislative intent behind the statute and the Board's duty to hear and dispose of unfair labor practice charges. The Board was guided further by its previous decision in *West Chicago School District No. 33*, 5 PERI ¶ 1091 (IELRB 1989), *aff'd*, 218 Ill. App. 3d 304, 578 N.E.2d 232 (1st Dist. 1991), in which it referred a Section 14(a)(5) charge to arbitration. Section 14(a)(5) of the Act prohibits employers from "refusing to bargain in good faith . . . provided, however, that if an alleged unfair labor practice involves interpretation or application of the terms of a collective bargaining agreement and said agreement contains a grievance and arbitration procedure, the Board *may* defer the resolution of such dispute to the grievance and arbitration procedure." (emphasis added). The Board further noted that the deferral language is not included in any other section of the Act except in 14(a)(5).

Also guided by the legislative history, the Board noted that the specific deferral language found in Section 14(a)(5) was added by amendatory veto by Governor James R. Thompson in 1983. The Board concluded that the Governor and legislature intended to limit deferral to only those charges arising under Section 14(a)(5).

In addition, the Board's determination not to refer the charge to arbitration was guided by its statutory duty to hear and dispose of unfair labor practice charges. Thus, the Board concluded that it cannot abdicate or avoid such a duty be ceding its jurisdiction to private tribunals.

Jurisdiction

In *East St. Louis District 189 and East St. Louis School District 189 Financial Oversight Panel and East St. Louis Federation of Teachers, Local 1220, IFT/AFT, No. 95-CA-0031-S* (IELRB 1998), the IELRB held that an unfair labor practice charge may not properly be filed against a Financial Oversight Panel created pursuant to Section 1A-8 of the School Code, even if the financial oversight panel has exceeded its statutory authority. A financial oversight panel is created when a district violates its financial plan, *i.e.* if the district goes over budget for the year. The legislature amended Section 14 of the IELRA by adding the following language: "The actions of a Financial Oversight Panel . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act. Such actions include, but are not limited to, reviewing, approving, or rejecting . . . a collective bargaining agreement."

The charge in this case alleged that the District and the Panel violated Section 14(a)(5) of the IELRA by unilaterally contracting out bargaining unit work. The Union argued: (1) that the amendment to the IELRA did not apply retroactively; (2) that the amendment did not prevent a charge of an unfair labor practice when a Financial Oversight Panel exceeds its statutory authority; and (3) that the Board had jurisdiction over the Panel as a joint employer with the District or as an agent of the District.

The IELRB held that the amendment applied retroactively. The Board stated that there is a presumption that repeals are applied retroactively.

Second, the IELRB held that even if a Financial Oversight Panel exceeds its statutory authority, the Panel's conduct does not constitute an unfair labor practice. The Board reasoned that when the language of a statute is clear and not ambiguous, the Board may not read into it exceptions or limitations.

Third, the IELRB held that it did not have jurisdiction over the Panel as a joint employer with the District or an agent of the District. The Board explained that it does not have jurisdiction over an entity as a joint employer unless that entity is also an educational employer. Because the legislature stated that a Financial Oversight Panel is not an educational employer, the Board can not have jurisdiction over the Panel as a joint employer. Further, the Board explained that it did not have jurisdiction over the Panel as an agent of the District. Here the Board reiterated that the legislature has clearly stated that the actions of a Financial Oversight Panel "shall not constitute . . . an unfair labor practice under any provisions of this Act." Thus, regardless of whether the Panel is an employer or an agent, its actions simply cannot constitute an unfair labor practice.

IPLRA Developments

Protected Concerted Activity

In *Perez and State of Illinois, Dept. of Central Management Services (Dept. of Rehabilitation Services)*, Case No. S-CA-97-47(ISLRB 1998), the State Board held that the Department violated Section 10(a)(1) of the Act when it forcibly removed Mr. Perez from a

union meeting. Mr. Perez served as AFSCME Local 1038's president for ten years. In 1996, a rift developed between Perez and the Local's vice-president, Earl Miller. On January 6, 1997, Mr. Miller, along with three others, voted to suspend Perez as president and appoint Miller as acting president. Miller promptly informed Perez, AFSCME's international headquarters and various management officials of the decision. Upon hearing the news, Perez informed the same management officials that he, and not Miller, was the president.

The next union meeting was held at one of the employer's facilities. Both Miller and Perez attempted to conduct their own separate meetings. After some initial bickering between the two, Miller asked a management official to remove Perez from the premises. The management official asked Perez to leave. When Perez became angry, the official called a security guard who ushered him out of the room.

The Board analyzed the case under the framework announced in *Village of Bensenville*, 10 PERI ¶ 2009 (ISLRB 1993). Under *Village of Bensenville*, "the rights of employees to engage in protected concerted activity should prevail unless the employer can demonstrate special circumstances indicating that a restriction on activity is necessary for the maintenance of health, safety or discipline."

Based on the evidence, the Board concluded that the Department was aware of the on-going dispute over the presidency of the Local. The Department was also aware that Perez was "merely attempting to carry out what he believed were his legitimate powers and duties as local union officer." Thus, in ordering Perez removed, the Board concluded that the Department "plainly restrained and coerced Perez in the free exercise of concerted union activities." Further, removing Perez from the meeting also made it clear to the "employees that [the Department] was backing Miller in the union leadership battle." The Board rejected the Department's argument that its decision to remove Perez was based on its interest in maintaining order and safety at the workplace. The Board also rejected the Department's argument that it was "simply attempting to cooperate with the [union's] new leadership." Thus, by removing Perez, the Board concluded that the Department interfered with the employees' right to choose their local union leadership free from employer influence.

First Amendment Developments

Fair Share Fees

In *Air Line Pilots Association v. Miller*, 118 S. Ct. 1761 (1998), the United States Supreme Court held, that unless they agree to the procedure, agency fee objectors may not be required to exhaust a union-provided arbitration process before bringing an agency fee challenge in federal court. The Air Line Pilots Association ("ALPA") represented pilots employed by most commercial air carriers, including Delta Airlines ("Delta"). The case arose out of a dispute between a group of Delta pilots and the ALPA. Specifically, the pilots claimed that the ALPA overstated the percentage of its expenditures attributable to collective bargaining and contract administration.

The ALPA rules provided that agency fee disputes were to be resolved through arbitration. Accordingly, the union treated the pilots' objections as requests for arbitration and arranged for an arbitrator to resolve the objections.

In writing for the majority, Justice Ginsburg explained that in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Court held "that the First Amendment required unions and employers to provide procedural protections for nonunion workers who object to the calculation of agency fees." Specifically, employees must receive sufficient information to gauge the propriety of the union's fee, the union must give objectors a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and any amount of the objector's fee reasonably in dispute must be held in escrow while the challenge is pending.

Justice Ginsburg examined Justice White's concurring opinion in *Hudson*. In that opinion, Justice White stated, "if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." Agreeing with the court below that Justice White offered "no legal basis for forcing into arbitration a party who has never agreed to put his dispute over federal law to such a process," Justice Ginsburg explained that the majority "declin[ed] to read *Hudson* as a decision that protects nonunion members at a cost—delayed access to federal court—they do not wish to pay."

The ALPA argued that the exhaustion doctrine should apply to agency-fee arbitration. Justice Ginsburg explained that the exhaustion doctrine requires parties to exhaust administrative processes established by Congress before turning to the judiciary to resolve a dispute. Thus, because the arbitration process is established by private parties, not Congress, Justice Ginsburg concluded the exhaustion doctrine was not applicable.

ALPA next argued that requiring agency-fee objectors to proceed first to arbitration is more efficient than allowing them to bring their claim immediately to federal court. Specifically, the Union argued that because "plaintiffs who challenge an agency-fee calculation are not required to state any grounds whatsoever for their challenge," the arbitration process serves an "essential role in

defining the scope of the dispute." However, because agency fee challengers "must make their objections known with the degree of specificity appropriate at each stage of litigation their case reaches," Justice Ginsburg concluded that conscientious management of the pretrial process would render the Union's efficiency argument moot. Justice Ginsburg noted, parenthetically, that if the arbitration process was indeed more efficient, "dissenting employees may avail themselves of that process even if not required to do so."

Justice Ginsburg acknowledged that a union might find itself "defending its fee calculation simultaneously in judicial and arbitral fora." However, Justice Ginsburg concluded that a union's interest in avoiding multiple proceedings, "does not overwhelm objectors' resistance to arbitration to which they did not consent, and their election to proceed immediately to court for adjudication of their federal rights." ◆

FURTHER REFERENCES

(compiled by Margaret A. Chaplan, Librarian, Institute of Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign)

Lucero, Margaret A., and Robert E. Allen. THE ARBITRATION OF CASES INVOLVING AGGRESSION AGAINST SUPERVISORS. Dispute Resolution Journal, vol. 53, no. 1, February 1998, pp. 57-63.

Some evidence suggests that arbitrators often reduce or rescind management's disciplinary measures against workers who have engaged in violent or aggressive behavior. In this article, the authors analyzed published arbitration awards from 1983-1993 in order to ascertain the reasons given by arbitrators for reducing or setting aside disciplinary penalties for physical or verbal abuse of supervisors. They found that arbitrators upheld employers totally or partially in almost 90% of the cases. Factors considered included the appropriateness of the penalty, evidence, the nature of the investigation, and the behavior of the supervisor. Employer actions were most likely to be upheld if they met common standards of just cause and employer policies were reasonable, consistent, and steadfastly enforced.

Masters, Marick F. AFSCME AS A POLITICAL UNION. Journal of Labor Research, vol. 19, no. 2, Spring 1998, pp. 313-349.

This article discusses AFSCME's departments for political education and fund raising, the scope of its political activity and the issues and legislative programs it supports, and its political

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effectiveness. Detailed information on the union's finances, the political action committee funds collected and how they are disbursed, some estimate of "soft money" and lobbying expenditures, and the use of dues money and the union's rebate procedure is presented. The author concludes that AFSCME is "a political player with which to be reckoned."

Williams, Russell L. ECONOMIC THEORY AND CONTRACTING OUT FOR RESIDENTIAL WASTE COLLECTION; HOW "SATISFYING" IS IT? Public Productivity & Management Review, vol. 21, no. 3, March 1998, pp. 259-271. Is contracting out the best way to deal with residential waste collection? In order to answer this question, the author used data from a survey of municipal managers in cities using either public or private collection of residential waste which asked how satisfied they were with the service. The responses indicate that there is no significant difference in satisfaction rates, and that neither pure public or pure market approaches give the one best way to handle waste collection. The results suggest that there is more being considered in government service provision than cost savings or efficiency and that satisfaction may be related more to the character of the municipality itself rather than solely economic concerns.

(Books and articles annotated in Further References are available on interlibrary loan through ILLINET by contacting your local public library or system headquarters.)

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